In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1539

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,

PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 63a–68a) is reported at 434 F. 2d 180. The first opinion of the district court (Pet. 30a–52a) is reported at 282 F. Supp. 698; its opinion (Pet. 60a–62a) following remand to the Commission has not been reported.

JURISDICTION

The order of the court of appeals was entered on November 24, 1970. A petition for rehearing was denied on January 4, 1971. The petition for a writ of

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certiorari was filed on April 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a shipper's acceptance of a check issued by a railroad in payment of reparations awarded by the Interstate Commerce Commission, which was marked "payment in full," barred the shipper from subsequently asserting before the Commission other reparations claims against the carrier.

2. Whether the shipper's subsequent reparations claims were timely filed.

STATUTE AND RULES INVOLVED

Section 16(3)(b) of the Interstate Commerce Act provides in pertinent part:

> (b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after * * *.

Rule 25(f) of the Commission's General Rules of Practice and Procedure, 49 C.F.R. 1100.25(f), provides in pertinent part:

> (f) *Six months' rule.* If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within six months after the date such notice is mailed, either a

> formal complaint as to such mater is filed, or it is informally resubmitted on an additional fact basis.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> Findings of fact [by the district court] shall not be set aside unless clearly erroneous * * *.

STATEMENT

On May 20, 1946, Thomson Phosphate Company filed an informal complaint with the Interstate Commerce Commission alleging that certain rates charged by railroads for the transportation of ground phosphate rock during the previous two years were unreasonable; it sought an order for payment of statutory reparations. During these informal proceedings Thomson took the position that its complaint also covered charges incurred during the pendency of the proceedings. In December 1947, the Atlantic Coast Line Railroad, as the originating carrier, offered to pay reparations "on all shipments involved in this informal complaint upon which the statute of limitations has not run" (Pet. 32, 33a).[1] In September 1950 the Commission directed that the railroads pay Thomson $13,012.51 as reparations on 185 specified shipments moved during the period up to April 7, 1945. Payment was made in November 1950 by a check bearing the phrase "payment in full." Thomson then requested additional reparations, pursuant to its informal com-

[1] The two opinions of the district court contain a summary of the complex history of the instant litigation (Pet. 30a–50a 60a–62a).

plaint, for shipments which had moved after April 7, 1945.

In June 1952, following correspondence between the Commission and the parties, the Secretary of the Commission advised Thomson that the informal proceedings were closed, since its further claims were not susceptible of informal settlement. Within six months (in October 1952), Thomson filed a formal complaint for reparations on shipments to five destinations previously covered by the informal complaint but not included in the 1950 award; this was followed by its request to reopen the informal complaint with respect to additional shipments which had also been covered by the original informal complaint and not satisfied by the prior award. Thomson further requested that the informal complaint be held in abeyance pending disposition of the formal proceeding (Pet. 33a–34a). The request was granted by the Commission in late December 1952 and it reopened the informal complaint "as originally filed" (Pet. 33a–34a).

Disposition of the formal complaint led to an award by the Commission of $1,463.80 (see 291 I.C.C. 1, 293 I.C.C. 369) which was paid by the railroads in October 1955. Payment was accompanied by the statement that it was "payment in full of all matters involved in * * * [or] growing out of that informal complaint" (Pet. 34a). In acknowledging receipt of the payment, Thomson referred to the continuing pendency of the informal complaint seeking

reparations for other outstanding claims, and requested settlement of them.

Further informal proceedings were then conducted but proved to be unproductive; consequently on March 29, 1956, the informal complaint proceeding was closed by the Commission. At the request of Thomson this proceeding was reopened on April 4, 1956; it again proved unproductive and was finally closed on April 19, 1956. Thomson thereupon filed a second formal complaint on October 16, 1956 (less than six months after the last closing on April 19), relating to shipments during the period of April 10, 1945, to December 31, 1950. This proceeding culminated in an award of $8,889.76 by the Commission in 1960 (311 I.C.C. 315).

In August 1962, Thomson instituted enforcement proceedings against the railroads in the United States District Court for the Southern District of New York. The railroads filed a cross-petition for review [2] attacking the award under the second formal complaint on a variety of grounds, including the allegation that the complaint to the Commission was untimely.

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[2] In September 1961, having refused to comply with the 1960 order of the Commission, the railroads had brought suit in the United States District Court for the Middle District of Florida to set aside the Commission's order. The subsequently instituted enforcement proceedings in the Southern District of New York were held in abeyance pending the outcome of this suit. Decision in favor of the railroads was ultimately reversed by this Court on jurisdictional grounds; the Court held that the railroads could file a cross-action in the court in which the enforcement action was pending. *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576. That was done.

The district court, *inter alia,* rejected the claim that the two-year limitation period of Section 16(3)(b) (*supra* p. 2) had run; it concluded that the original 1946 informal complaint had sufficiently encompassed the claims said to be barred by the statute (Pet. 36a–38a). It also rejected the contention that the informal complaint of 1956 was barred under the "six months'" standard of Rule 25(f) of the Commission's Rules of Practice (see *supra,* pp. 2–3). As to this, the court reasoned that the Commission had properly reopened the informal complaint on April 4, 1956, on the "additional fact basis" provided by the Rule. (Pet. 42a–45a). The district court reduced the award from $8,889.76 to $3,802.75 for reasons not here relevant (Pet. 49a). As thus modified, it remanded the case to the Commission to reconsider its reversal of the Hearing Examiner's conclusion that the compromise agreement and payment of $13,071.98 under the 1950 award constituted full settlement of all Thomson's claims (Pet. 50a, see also Pet. 38a–40a).

On remand the Commission determined (Pet. 56a–59a; 332 I.C.C. 641) that its 1950 order had authorized the payment of reparations on only 185 specifically enumerated shipments and that the order "did not by its terms authorize the railroads or the complainant to compromise any other claims that might be outstanding" (Pet. 56a). It stated that the railroads were not free to negotiate a settlement on the basis of something less than the tariff rate, or to bargain with shippers so as to preclude the latter from presenting claims to the Commission; it accordingly concluded

that the 1950 check with the phrase "payment in full" did not terminate the pending informal complaint (Pet. 56a–57a).

The district court sustained the Commission's decision[3] and reparations award of $3,802.75 (Pet. 60a–62a). The court of appeals affirmed (Pet. 63a–68a).

ARGUMENT

The decision below is correct and presents no question warranting further review.

1. The courts below properly held that the amount paid by the railroads in 1950 with a check marked "payment in full" did not settle all of Thomson's claims. As the Commission made clear on remand, its 1950 order authorized reparations on only 185 specifically enumerated shipments and did not "authorize the railroads or the complainant to compromise any other claims that might be outstanding" (Pet. 56a). As the Commission stressed, any different conclusion could result in "secret rebates and concessions" and consequently "make a mockery" of its statutory authority to fix rates and require adherence thereto (Pet. 56a). For these reasons, it concluded that all negotiations between carrier and shipper concerning rates had to be conducted with the knowledge and approval of the Commission and that no private settlement

[3] The court adopted the Commision's view that "carriers are not free to negotiate settlement on the basis of part payment of some claims, since such a procedure would preclude Commission determination of alleged overcharges on undisclosed shipments and permit carriers to avoid their legal obligations with respect to tariffs due on the latter shipments simply by not advising the Commision of such claims" (Pet. 61a).

could bar a shipper from complaining to the Commission of unreasonable rates. The courts below properly recognized these sound policy considerations[4] in upholding the Commission.

2. The further contention that Thomson's additional claims for reparations were barred by limitations are fully answered in the original opinion of the district court (Pet. 36a–45a), as affirmed by the court of appeals (Pet. 66a–67a). It is sufficient to observe here that since the April 4, 1956, reopening did not constitute a violation of the six months' provisions of Rule 25(f), the formal complaint filed on October 15, 1956, was timely. As the court of appeals pointed out, the Commission has interpreted the Rule 25(f) requirement of "a new fact basis" for reopening as being satisfied by "a fresh argument by the complainant"; that, as the opinion below makes clear, was the

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[4] The validity of the Commission's position is reinforced by its explanation of how the informal complaint procedure tends to facilitate settlements (Pet. 57a):

> [W]hen a shipper files an informal complaint covering a large number of shipments, it is not unusual for the carriers to submit more than one special docket application with regard to the shipments embraced in the informal complaint. This allows the carriers considerable convenience in breaking down the application by territory, rate group, originating or delivering carriers, date of shipment, and other such classifications, which in the normal situation expedites settlement of claims. For this reason, a special docket application and order cover only the particular shipments detailed therein.

While the Commission recognized that the purpose of expedition had not been achieved in this particular case, it stressed that "[f]ortunately the instant proceeding is the exception rather than the rule" (Pet. 57a–58a).

situation here (Pet. 67a). Moreover, as the court of appeals noted, the language of the Rule "must be construed in the context of a regulatory scheme which seeks to avoid the heavy burden of litigation when there is a possibility of negotiated settlement" (*ibid.*). In this posture the Commission properly ruled that the time limitations of the rule had not been violated. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413–414; *Udall* v. *Tallman*, 380 U.S. 1, 4.[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY, 1971.

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[5] In this case, the Commission applied the correct standard—the additional fact basis—to a particular set of facts. That it may in the past have applied the same standard differently in different factual contexts hardly supports the claim (Pet. 23–28) that it discriminated in this case.

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